

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

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4 RAMA SOU; TAI BUI; and SCOTT
5 ZIMMERMAN,

6 Plaintiffs,

7 v.

8 MICHAEL BASH; JEREMY BASH;
9 BERKLEY ENTERPRISES, INC.;
10 PEPPERDINE ENTERPRISES, INC.;
11 NINETY-FIVE FORT APACHE COMPLEX,
12 LLC; and ROYAL VIEW, LLC,

13 Defendants.

Case No. 2:15-cv-00698-APG-VCF

**ORDER (1) GRANTING IN PART
PLAINTIFFS' MOTION FOR
SANCTIONS AND (2) DENYING
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

(ECF Nos. 104, 106)

12 In 2010, defendants Michael and Jeremy Bash pitched the plaintiffs, Rama Sou, Tai Bui,
13 and Scott Zimmerman, on investing in two companies that owned property in Las Vegas: Ninety-
14 Five Fort Apache Complex, LLC (Fort Apache) and Royal View, LLC (Royal View). The
15 defendants allegedly told the plaintiffs of their intent to develop the properties on a certain
16 timetable. All three plaintiffs invested in Fort Apache, and Sou and Bui invested in Royal View,
17 for a total of \$300,000. The properties remain undeveloped.

18 The plaintiffs filed suit in 2014 on claims of fraudulent inducement, false promise, and
19 negligent misrepresentation. They now move for case-terminating sanctions against Michael
20 Bash and the corporate defendants for their failure to complete or appear for scheduled
21 depositions. The plaintiffs argue that the defendants have defied court orders and properly
22 noticed depositions, confounding the fair resolution of this case. They argue they are prejudiced
23 by the defendants' actions and that lesser sanctions will not be effective. The plaintiffs also ask
24 for attorneys' fees related to the missed depositions and the drafting of the instant motion.

25 The defendants oppose the motion, arguing Bash's non-appearance for the second half of
26 his deposition and as the corporate defendants' designated representative was a result of a health
27 issue. They argue that reopening discovery to complete the previously scheduled depositions is
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1 the appropriate remedy and should obviate any prejudice to the plaintiffs. They contend the
2 plaintiffs should not gain an advantage in this litigation as a result of Bash's old age and health
3 issues. The defendants also move for summary judgment, arguing the plaintiffs have not
4 presented sufficient evidence to support their claims.

5 I grant the plaintiffs' motion in part. While there is some evidence of prejudice to the
6 plaintiffs from the defendants' conduct during discovery, lesser sanctions are feasible and
7 appropriate at this time. I deny the defendants' motion for summary judgment as it was not
8 timely filed and there remain genuine disputes of material fact.

9 **I. BACKGROUND**

10 This case was initially filed in the Central District of California in October 2014. ECF
11 No. 1. It was transferred to this district pursuant to a forum selection clause in the investment
12 agreements underlying the litigation. ECF No. 28. On November 13, 2015, the court set a
13 discovery deadline of March 2, 2016. ECF No. 62.

14 Discovery has since been extended five times, primarily to accommodate the defendants'
15 scheduling issues surrounding the plaintiffs' attempts to depose them. *See* ECF Nos. 69, 79, 85,
16 98, 102. The last extension was agreed to at a status conference in December, where the parties
17 informed the court that depositions were set for February 13-16, 2017. ECF No. 102.

18 Jeremy Bash sat for his deposition on February 13th. ECF No. 104-6. Michael Bash was
19 present for an unsuccessful mediation session the following morning, and sat for his scheduled
20 deposition that afternoon. ECF No. 104-8. Upon concluding for the day, the parties agreed that
21 Michael would continue his individual deposition the next morning, followed by the deposition
22 of Michael as the corporate defendants' designated representative that afternoon and the
23 following day. ECF No. 104-3. However, Michael failed to appear the next morning because,
24 according to his attorneys, he had gone to the hospital. *Id.* The plaintiffs sought proof of
25 Michael's medical issues, which was not provided until the defendants' response to this motion.
26 The plaintiffs also tried to reschedule the depositions, but defendants' counsel never responded.
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1 *Id.* Michael Bash never sat for the remainder of his deposition, nor was any representative for
2 the corporate defendants deposed. The motion for sanctions resulted.

3 **II. ANALYSIS**

4 Under Federal Rule of Civil Procedure 37, the court may enter any just orders, including
5 any of the sanctions listed in Rule 37(b)(2)(A)(i)-(vi), if a party fails to appear for its own
6 properly noticed deposition. Fed. R. Civ. P. 37(d)(1)(A)(i); *id.* at 37(d)(3). One of the available
7 sanctions is rendering a default judgment against the “disobedient party.” *Id.* at 37(b)(2)(A)(vi).

8 In determining whether such a case-terminating sanction is appropriate, I weigh five
9 factors: the public’s interest in expeditious resolution of litigation, the court’s need to manage its
10 docket, the risk of prejudice to the party seeking sanctions, the public policy favoring disposition
11 of cases on their merits, and the availability of less drastic sanctions. *Hyde & Drath v. Baker*, 24
12 F.3d 1162, 1166 (9th Cir. 1994). I am not required to make explicit findings regarding each
13 factor, but the key factors are prejudice and the availability of lesser sanctions. *Wanderer v.*
14 *Johnston*, 910 F.2d 652, 656 (9th Cir. 1990) (stating further that “[t]he first two of these factors
15 favor the imposition of sanctions in most cases, while the fourth cuts against a default . . .
16 sanction”).

17 **a. Risk of prejudice to the plaintiffs**

18 This factor “looks to whether the [defendants’] actions impaired [the plaintiffs’] ability to
19 go to trial or threatened to interfere with the rightful decision of the case.” *U.S. ex rel. Wiltec*
20 *Guam, Inc. v. Kahaluu Const. Co.*, 857 F.2d 600, 604 (9th Cir. 1988). In *Hyde & Drath*, the
21 Ninth Circuit affirmed a dismissal where the district court found that because the plaintiffs
22 “continually ignored scheduled depositions,” the defendants “faced a fast approaching court date,
23 a lack of crucial information, and an inability to construct a defense.” 24 F.3d at 1167; *see also*
24 *Commodity Futures Trading Comm’n v. Noble Metals Int’l, Inc.*, 67 F.3d 766, 771 (9th Cir.
25 1995) (holding a party’s ability to make its case was prejudiced by the other party’s willful
26 refusal to comply with a court order to designate a representative who could testify at a discovery
27 deposition). Thus, in *Hyde & Drath* the movants’ inability to depose most of the other parties
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1 was alone sufficient to find prejudice supporting case-ending sanctions. In other cases, the Ninth
2 Circuit has upheld findings that delay and refusal to complete depositions, when compounded
3 with a failure to complete written discovery, were sufficiently prejudicial to support case-ending
4 sanctions. *See, e.g., Wanderer*, 910 F.2d at 656.

5 The plaintiffs have been able to fully depose only one party (Jeremy Bash), and
6 completely unable to elicit deposition testimony from the corporate defendants. The plaintiffs
7 argue that if the case were to go to trial without complete depositions, they would be hearing for
8 the first time testimony from witnesses they were entitled to depose. The defendants respond
9 that rescheduling the previously scheduled depositions is a proper remedy.

10 Discovery in this case was extended for nearly a year, primarily to obtain deposition
11 testimony, the majority of which was never obtained. The initial discovery deadline was March
12 2, 2016. ECF No. 62. Depositions for Michael Bash and the corporate defendants for whom
13 Michael was the designated representative were last scheduled for February 14-16, 2017. The
14 parties attempted to structure discovery such that Jeremy Bash, who is not a party to this motion,
15 would be deposed first, followed by attempted mediation, then the deposition of Michael and the
16 corporate defendants. Jeremy's deposition was rescheduled three times due to his refusal to
17 appear and scheduling difficulties, as a result pushing off the mediation and the other
18 depositions. *See* ECF Nos. 69, 85, 102.

19 Michael appeared for approximately half of his scheduled deposition. He did not appear
20 for the second half or for any of the noticed depositions on behalf of the corporate defendants
21 due to a health issue. According to a medical report provided by the defendants in their
22 opposition, it appears that Michael visited a doctor on February 15, 2017 (the second scheduled
23 day of his depositions) complaining of lower back pain due to a "10 year [sic] history of lower
24 back issues with degenerative disc disease." ECF No. 106-14. The doctor's assessment notes
25 that "Michael cannot sit for any prolonged time, i.e. greater than 30 minutes." *Id.* Apparently
26 based on this diagnosis, Michael refused to be deposed any further.

1 The plaintiffs do not claim that the defendants have not responded to written discovery or
2 failed to produce documents. While a trial date has not yet been set, discovery was delayed
3 almost a year due to the defendants' alleged scheduling issues and then halted altogether by
4 Michael's non-appearance. It seems likely that the plaintiffs are lacking crucial information to
5 construct their case and have been prejudiced by the defendants' behavior. This factor weighs in
6 favor of sanctions.

7 **b. Less drastic sanctions**

8 Before rendering a default judgment under Rule 37, I must consider the feasibility and
9 appropriateness of lesser sanctions, determine whether lesser sanctions have already been
10 implemented, and warn the non-moving party that default is possible. *Hyde & Drath*, 24 F.3d at
11 1167. The plaintiffs have not moved for lesser sanctions against Michael Bash or the corporate
12 defendants, nor have any been imposed. Further, no warning has been given about the
13 possibility of a default judgment.

14 The plaintiffs did not move to compel the depositions at issue or for other lesser sanctions
15 before moving for this drastic remedy. Although they argue that lesser sanctions will be
16 ineffectual, there is no evidence to this effect, because less drastic measures than default
17 judgment have not yet been attempted. *Cf. Noble Metals Int'l*, 67 F.3d at 772 (finding a dismissal
18 sanction appropriate when party refused to comply with motion to compel or monetary sanction).
19 The defendants argue that discovery should be reopened to allow for the completion of
20 previously scheduled depositions. I agree and find that lesser sanctions are feasible and
21 appropriate in this situation.

22 Therefore, discovery shall be reopened solely for the completion of the previously
23 scheduled depositions of Michael Bash in his individual capacity and as the representative for the
24 corporate defendants.¹ If after taking the depositions of Michael and the corporate defendants

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26 ¹ If Michael is truly unable to sit for more than 30 minutes at a stretch, the parties should take short breaks for
27 reasonable periods of time. However, such breaks should not be so numerous or lengthy as to disrupt the flow of the deposition. Moreover,
28 Michael may stand during his deposition as needed. Finally, so numerous or lengthy as to disrupt the flow of the
deposition. Moreover, Michael may stand during his deposition as needed. Finally, he may want to consider
bringing a small cot to the deposition so he can be deposed while lying down.

1 the plaintiffs feel further discovery is warranted, they may move to reopen discovery. The
2 defendants are warned that failure to attend the depositions may be grounds for a default
3 judgment.

4 **c. Attorneys' fees and costs**

5 Under Rule 37(d)(3), if a party fails to attend its own properly noticed deposition, instead
6 of or in addition to other sanctions, "the court must require the party failing to act, the attorney
7 advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by
8 the failure, unless the failure was substantially justified or other circumstances make an award of
9 expenses unjust." The plaintiffs argue that Michael's failure to sit for the scheduled depositions
10 is not substantially justified. In particular, they argue that Michael did not provide evidence of
11 his health problem, nor did he "meaningfully propose a date for his re-noticed deposition." ECF
12 No. 104 at 23. Further, the plaintiffs argue that the corporate defendants should have designated
13 another witness to be deposed. The defendants respond that Michael's absence from the
14 depositions was justified by his health issues. They also contend that he is the only possible
15 corporate witness.

16 While Michael's health issues may justify his initial absence on the morning of February
17 15th when he went to the doctor, his diagnosis does not appear to lead inevitably to the result
18 that he could not attend any further deposition at all. Instead, he could have rescheduled his
19 depositions and requested accommodations, such as breaks, when necessary. Furthermore,
20 Michael seems to have known about this back issue throughout the litigation, but did not mention
21 that it would cause issues when his counsel was scheduling the depositions.

22 Therefore, Michael Bash must pay the court reporter fees and other costs associated with
23 the half day of his previously noticed deposition for which he did not appear. Michael Bash
24 must also pay the plaintiffs' attorneys' fees and costs associated with preparing this motion and
25 reply (ECF Nos. 104, 109). The parties shall confer about such costs, and if they cannot come to
26 an agreement, the plaintiffs may submit an affidavit to the court.

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